

Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter of The Applications of
Great Scott Broadcasting,
Assignor
and
Nassau Broadcasting II, L.L.C.,
Assignee
For Consent to Assignment of Licenses of
WCHR(AM), Trenton, NJ, and
WNJO(FM), Trenton, NJ
File Nos. BAL-980910GI
and BALH-980910GJ

MEMORANDUM OPINION AND ORDER

Adopted: February 14, 2002

Released: March 19, 2002

By the Commission: Chairman Powell and Commissioners Abernathy and Martin issuing separate statements; Commissioner Copps dissenting and issuing a statement.

1. In this order, we consider the above-captioned applications of Nassau Broadcasting II, L.L.C. ("Nassau") to acquire the licenses of stations WCHR(AM) and WNJO(FM), Trenton, New Jersey from Great Scott Broadcasting ("Great Scott"). Because these applications were pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("Local Radio Ownership NPRM"), we resolve the competitive concerns raised by these applications pursuant to the interim policy adopted in that notice. After reviewing the record, we find that grant of these applications is consistent with the public interest.

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market. In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996. Since then, the Commission has granted thousands of assignment and transfer of control applications

1 Prior to an amendment dated June 7, 2000, the proposed assignee was Nassau Broadcasting Partners, L.P., an affiliate of Nassau.

2 See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

3 See generally id. at 19862-70 ¶¶ 3-18.

proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has “an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest.”<sup>4</sup> In August 1998, the Commission also began “flagging” public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission’s public interest concerns.<sup>5</sup>

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that “our current policies on local radio ownership [did] not adequately reflect current industry conditions” and had “led to unfortunate delays” in the processing of assignment and transfer applications.<sup>6</sup> Accordingly, we adopted the *Local Radio Ownership NPRM* “to undertake a comprehensive examination of our rules and policies concerning local radio ownership” and to “develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition.”<sup>7</sup> In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to “guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding.”<sup>8</sup> Although we recognized the need to “handle currently pending radio assignment and transfer applications and to address any future applications filed” while the *NPRM* is pending, we disavowed any intent to prejudge the “ultimate decision” in the rulemaking and rejected any “fundamental” changes to our current policy pending completion of the rulemaking.<sup>9</sup>

6. Under our interim policy, “we presume that an application that falls below the [50/70] screen will not raise competition concerns” unless a petition to deny raising competitive issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission’s staff to “conduct

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<sup>4</sup> *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)). See also *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

<sup>5</sup> See Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market. See *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

<sup>6</sup> *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 19894 ¶ 84.

<sup>9</sup> *Id.*

a public interest analysis,” including “an independent preliminary competitive analysis,” and sets forth generic areas of inquiry for this purpose.<sup>10</sup> The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competitive concerns.

7. We decide the applications before us pursuant to our interim policy. Under our interim policy, we first conduct a competition analysis of the proposed transaction. Here, we find that the proposed transaction could raise serious competitive concerns by combining two of the three highest revenue generating stations in the Trenton metro and potentially creating a market in which Nassau could have up to a 57 percent radio advertising market share and the top two station groups could have up to a 95 percent radio advertising market share. These concentration levels, however, do not provide a complete picture of the competitive realities within the Trenton market. Two factors in particular – the high listener share held by stations not included within the Trenton metro and the low percentage of station revenue coming from local advertisers – indicate that competitive forces outside the Trenton metro play a substantial role. In taking these and other factors into consideration, we find that the competitive characteristics of the Trenton market mitigate any concern that the level of concentration produced by the proposed transaction will cause adverse effects that are inconsistent with the public interest. Because of this, and because we find that the proposed transaction produces some public interest benefits, we grant the applications to permit Nassau to acquire the Great Scott stations in Trenton.

## II. BACKGROUND

8. Nassau currently is the licensee of three stations in the Trenton, NJ metro:<sup>11</sup> (1) WPST(FM), Trenton, NJ; (2) WTTM(AM), Princeton, NJ (Expanded Band); and (3) WHWH(AM), Princeton, NJ.<sup>12</sup> Through its proposed acquisition of WCHR(AM) and WNJO(FM), Nassau would own two FM stations and three AM stations (including one expanded band AM station) in the Trenton metro.

9. On September 29, 1998, the Commission issued a public notice indicating that the Nassau applications had been accepted for filing.<sup>13</sup> The public notice also “flagged” the applications pursuant to the Commission’s “50/70” screen. Under this screen, the Commission flags proposed transactions for further competition analysis if the transaction would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market.<sup>14</sup> Based on Year 2000 revenue estimates from the BIA<sup>15</sup>

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<sup>10</sup> *Id.* at 19895 ¶ 86.

<sup>11</sup> A metro is a metropolitan area defined by the Arbitron rating service, which is used by radio stations and radio advertisers in negotiating and determining advertising rates.

<sup>12</sup> On November 19, 2001, Nassau and Multicultural Broadcasting, Inc. (“MBI”) filed an application to assign WTTM(AM) and WHWH(AM) from Nassau to MBI. *See* FCC File Nos. BAL-20011119ABU and BAL-20011119ABR. These applications were granted on January 15, 2002. *See* Public Notice, Broadcast Actions, Report No. 45154 (rel. Jan. 18, 2002). Nassau will continue to operate WHWH(AM) pursuant to a time brokerage agreement (“TBA”) until January 7, 2003, at which time the license for the station must be cancelled pursuant to the rules for AM expanded band stations. Response to November 14, 2001 Letter of Nassau Broadcasting, Inc. (filed Dec. 6, 2001) (“Nassau Dec. 6, 2001 Response”) at 25 n.59.

<sup>13</sup> *See* Public Notice, Broadcast Applications, Report No. 24336 (rel. Sept. 29, 1998).

<sup>14</sup> *See generally Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 18. A flagged public notice includes the following language:

Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is

database, the five stations that Nassau proposes to own account for an 86.1 percent revenue share in the Trenton Arbitron metro. Post-consummation, Nassau and Press would collectively control 92.9 percent of the advertising revenue in the Trenton metro.<sup>16</sup>

10. In response to the flagged public notice, Press Communications, L.L.C. (“Press”) and Nassau filed comments regarding the potential impact of the proposed transaction on competition in the Trenton market.<sup>17</sup> Nassau filed a supplemental response and reply to Press’s comments on November 18, 1998, in which Nassau submitted a special study prepared by BIA Consulting, Inc. concerning competition in the Trenton market.<sup>18</sup> Press submitted a response to the BIA study on December 4, 1998.<sup>19</sup> On January 27, 1999, the Department of Justice informed the Commission that it had concluded the investigation that it had opened on the proposed transaction without taking any action. The Mass Media Bureau sent an inquiry letter on March 1, 1999,<sup>20</sup> seeking additional information concerning, *inter alia*, the substitutability of out-of-market radio stations for in-market radio stations.<sup>21</sup> In response to this letter, the parties filed additional materials concerning the potential competitive impact of the proposed transaction.<sup>22</sup> On August 1, 2001, Press filed a letter stating it was withdrawing all of its submissions

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undertaken pursuant to the Commission’s obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

<sup>15</sup> BIA is a communications and information technology investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

<sup>16</sup> Nassau’s post-merger market share, as reported by BIA, is higher today than when public notice of the application was issued because BIA has since changed the home market of one of Press’s stations from the Trenton metro to the Middlesex-Somerset-Union metro market. *See* Nassau Dec. 6, 2001 Response at 16-17.

<sup>17</sup> *See* Comments of Press Communications, L.L.C. (filed Oct. 29, 1998) (“Press Comments”); Diversity, Competition and Radio Revenue Submission of Nassau Broadcasting Partners, L.P. (filed Oct. 28, 1998).

<sup>18</sup> Supplement to Diversity, Competition and Radio Revenue Submission of Nassau Broadcasting Partners, L.P. and Response to Comments of Press Communications, L.L.C. (filed Nov. 18, 1998) (“Nassau Nov. 18, 1998 Supp.”).

<sup>19</sup> Response of Press Communications, L.L.C. to “Supplement to Diversity, Competition and Radio Revenue Submission” (filed Dec. 4, 1998) (“Press Dec. 4, 1998 Response”).

<sup>20</sup> Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, to Harry F. Cole *et al.* (dated Mar. 1, 1999).

<sup>21</sup> As used here, in-market stations are radio stations whose “home market,” as reported by BIA, is the Arbitron metro market at issue. Out-of-market stations are radio stations that BIA reports as having a listening share in a particular Arbitron market, but that have a “home market” in another Arbitron market or in a county that is not part of an Arbitron market.

<sup>22</sup> *See* Letter from Harry F. Cole, Counsel for Press Communications, L.L.C., to Linda Blair, Chief, Audio Services Division, Mass Media Bureau (dated Mar. 18, 1999); Letter from Cary S. Tepper, Counsel for Nassau Broadcasting Partners, L.P. to Linda Blair, Chief, Audio Services Division, Mass Media Bureau (dated Mar. 26, 1999) (objecting to information request); Letter from Dennis P. Corbett, Counsel for Great Scott Broadcasting, to Linda Blair, Chief, Audio Services Division, Mass Media Bureau (dated Apr. 1, 1999); Response to Letter Inquiry of Press Communications, L.L.C. (filed Apr. 16, 1999) (“Press Apr. 16, 1999 Response”); Withdrawal of Attachment of Press Communications, L.L.C. (filed June 10, 1999); Statement for the Record of Nassau Broadcasting Partners, L.P. (filed June 18, 1999); Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, to Harry

relating to these applications,<sup>23</sup> and on September 28, 2001, Nassau filed a letter requesting action on its applications.<sup>24</sup>

11. On November 14, 2001, the staff provided the parties an opportunity to update the record in light of competitive changes that had occurred in the Trenton market and in light of the interim policy.<sup>25</sup> In response, the staff received a response and a supplement to the response from Nassau and comments from Great Scott urging the Commission to grant the applications.<sup>26</sup> In addition, Nassau filed an updated multiple ownership exhibit on December 19, 2001.<sup>27</sup> Press reiterated that it no longer sought to participate in this proceeding.<sup>28</sup>

### III. DISCUSSION

#### A. Framework for Analysis Under Interim Policy

12. Section 310(d) of the Communications Act of 1934, as amended (the “Communications Act”), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of Great Scott’s radio broadcast licenses to Nassau before the assignment may occur.<sup>29</sup> We are making that finding in this case pursuant to the interim policy laid out in the recently issued *Local Radio Ownership NPRM*.<sup>30</sup> Under the interim policy, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of the proposed transaction

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F. Cole *et al.* (dated June 25, 1999) (reiterating request for information); Letter from Cary S. Tepper, Counsel for Nassau Broadcasting Partners, L.P., to Magalie Roman Salas, Secretary, Federal Communications Commission (filed July 8, 1999) (“Nassau July 8, 1999 Response”) (includes information subject to request for confidentiality); Certification of “Withdrawal of Attachment” of Press Communications, L.L.C. (filed July 16, 1999); Letter from Dennis P. Corbett, Counsel for Great Scott Broadcasting, to Linda Blair, Chief, Audio Services Division, Mass Media Bureau (dated July 16, 1999); Letter from Cary S. Tepper, Counsel for Nassau Broadcasting Partners, L.P., to Magalie Roman Salas, Secretary, Federal Communications Commission (filed July 29, 1999) (clarifying request for confidentiality). In addition to these filings, Great Scott and Press filed additional letters in March 2000 concerning the proposed transaction. *See* Letter from Dennis P. Corbett, Counsel for Great Scott Broadcasting, to Roy J. Stewart, Chief, Mass Media Bureau (dated Mar. 3, 2000); Letter from Harry F. Cole, Counsel for Press Communications, L.L.C., to Roy J. Stewart, Chief, Mass Media Bureau (dated Mar. 10, 2000); Letter from Harry F. Cole, Counsel for Press Communications, L.L.C., to Roy J. Stewart, Chief, Mass Media Bureau (dated Apr. 7, 2000).

<sup>23</sup> Letter from Harry F. Cole, Counsel for Press Communications, L.L.C., to Magalie Roman Salas, Secretary, Federal Communications Commission (filed Aug. 1, 2001).

<sup>24</sup> Letter from Laurence E. Harris, Counsel for Nassau Broadcasting II, L.L.C., to Jane Mago, General Counsel, Federal Communications Commission (dated Sept. 28, 2001).

<sup>25</sup> Letter from Peter Doyle, Chief, Audio Services Division, Mass Media Bureau, to Dennis P. Corbett, Esq., *et al.* (dated Nov. 14, 2001).

<sup>26</sup> Nassau Dec. 6, 2001 Response; Supplement to Response to November 14, 2001 Letter of Nassau Broadcasting, Inc. (filed Dec. 21, 2001); Comments of Great Scott Broadcasting (filed Dec. 21, 2001).

<sup>27</sup> *See* Letter from Ketrina Gleber, Associate, Patton Boggs, L.L.P., to Magalie Roman Salas, Secretary (dated Dec. 29, 2001) (“Multiple Ownership Amendment”).

<sup>28</sup> *See* Letter of Press Communications, L.L.C. (dated Dec. 3, 2001).

<sup>29</sup> 47 U.S.C. § 310(d).

<sup>30</sup> *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

based on publicly available information and information in the Commission's records.<sup>31</sup>

13. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.<sup>32</sup>

14. The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition"<sup>33</sup> in the advertising market, our focus is different.<sup>34</sup> Our analysis of radio license assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."<sup>35</sup> These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service available to everyone and promoting locally oriented service and diversity in media voices.<sup>36</sup> Our public

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<sup>31</sup> *Id.* at 19895-96 ¶ 86.

<sup>32</sup> *Id.* at 19895 ¶ 85; see *VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 ¶ 17 (2001); see also *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

<sup>33</sup> 15 U.S.C. § 18.

<sup>34</sup> Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. See *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). See also *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1<sup>st</sup> Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

<sup>35</sup> See *AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*Worldcom-MCI Order*").

<sup>36</sup> For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,<sup>37</sup> and whether it will result in the provision of new or additional services to listeners.<sup>38</sup>

15. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

## **B. Local Radio Ownership Rules**

16. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.<sup>39</sup> A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.<sup>40</sup> Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50 percent of the stations in such a market.<sup>41</sup>

17. We find that Nassau's proposed acquisition of the Great Scott stations is consistent with the numerical limits in our local radio ownership rules. Nassau's multiple ownership showing indicates that, using the Commission's current definition of "radio market,"<sup>42</sup> the transaction creates one radio market, composed of 49 radio stations.<sup>43</sup> In this market, a single licensee may, therefore, own up to 8 radio stations, not more than 5 of which are in the same service (AM or FM). If Nassau acquires the Great Scott stations, Nassau will own 4 stations (2 AM/2 FM) in the market.<sup>44</sup> The transaction therefore

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<sup>37</sup> See *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

<sup>38</sup> See, e.g., *Worldcom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

<sup>39</sup> 47 C.F.R. § 73.3555(a).

<sup>40</sup> *Id.*; see *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

<sup>41</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(b)(1); 47 C.F.R. § 73.3555(a)(1).

<sup>42</sup> See *Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077 (2000).

<sup>43</sup> See Multiple Ownership Amendment. The contour of WTTM(AM) is not considered in defining the market for purposes of the local radio ownership rule because it is an expanded band station. See 47 C.F.R. § 73.3555 note 9.

<sup>44</sup> Even if Nassau's proposed sale of WTTM(AM) and WHWH(AM) to MBI were consummated, it would not alter the multiple ownership analysis. Because WTTM(AM) is an expanded band station, we do not consider it in the

complies with the multiple ownership rules.

### C. Public Interest Analysis Under Interim Policy

18. In the interim policy, we stated that, consistent with precedent, we will continue to examine the potential competitive effects of proposed radio station combinations. Competition analysis requires us to define at the outset the relevant product and geographic markets in which the radio stations compete. We must also determine the market shares and concentration levels that the proposed transaction would produce. Ultimately, we must weigh the potential competitive benefits and harms, as well as other public interest benefits and harms, that the proposed transaction is likely to produce to determine if, overall, grant of the underlying application would be consistent with the public interest.

19. *Relevant Product Market.* As with any competition analysis, we must first define the relevant product and geographic markets. Under our interim policy, we presume that the relevant product market is radio advertising.<sup>45</sup> Nassau seeks to rebut this presumption. According to Nassau, the relevant product market includes newspaper advertising.<sup>46</sup> Specifically, Nassau asserts that the advertising revenues of two daily newspapers in Mercer County, the *Trenton Times* and the *Trentonian*, should be considered in the market analysis.<sup>47</sup> Nassau also submitted an economic analysis conducted by BIA (the “2001 BIA Special Study”) that suggests that the local cable system, outdoor advertising, and direct mail advertising should be included in the relevant product market.<sup>48</sup> In addition, Nassau submitted an affidavit prepared by Dr. Stephen Stockum of Glassman-Oliver Economic Consultants, Inc. (“Stockum Affidavit”), in which Dr. Stockum opines that the relevant product market includes network television, yellow pages, and magazine advertising, in addition to the media advertising previously mentioned.<sup>49</sup>

20. We find that Nassau has not rebutted the presumption that radio advertising is the relevant product market. Aside from the Stockum Affidavit, Nassau’s arguments consist merely of conclusory assertions that other forms of media advertising are available to Trenton advertisers. Under standard competition analysis, however, alternative media would be included in the relevant product market only if their presence would preclude a hypothetical monopolist of radio advertising from profitably raising prices by a “small but significant and nontransitory” amount.<sup>50</sup> Nassau fails to make this showing.

21. Similarly, we do not find the Stockum Affidavit sufficient to rebut our presumption concerning product market definition. Dr. Stockum uses data from the VoiceTrak Market Activity Report (“VoiceTrak”), “an advertising tracking service that surveys local advertisers to determine their advertising purchase behavior,” to conclude that advertisers in various industry sectors do not rely heavily on radio advertising and that the purchase of radio advertising varies considerably by individual

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multiple ownership analysis. See 47 C.F.R. § 73.3555 note 9. Because Nassau will broker WHWH(AM) pursuant to a TBA, it will be attributable to Nassau for purposes of the multiple ownership analysis. *Id.* § 73.3555 note 2(k).

<sup>45</sup> *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

<sup>46</sup> Nassau Dec. 6, 2001 Response at 19.

<sup>47</sup> *Id.*

<sup>48</sup> 2001 BIA Special Study (attached as Exhibit 1 to Nassau Dec. 6, 2001 Response) at 4-5.

<sup>49</sup> Stockum Affidavit at 2-4.

<sup>50</sup> See, e.g., U.S. Dep’t of Justice & FTC, *1992 Horizontal Merger Guidelines*, §§ 1.1, 1.12 (revised 1997) (“1997 Merger Guidelines”).

advertiser and over time.<sup>51</sup> This, he concludes, evidences media substitutability.<sup>52</sup> The Stockum Affidavit is unclear, however, as to what forms of advertising other than radio the VoiceTrak data tracks, and we are unable to determine from the data presented whether the various forms of advertising are considered complements to radio or, as Dr. Stockum asserts, economic substitutes. Moreover, the relevant test for product market definition depends not on the likelihood of *any* substitution of other media for radio, but whether such substitution is sufficient enough to make *unprofitable* the price increase that induces the substitution. If such a price increase is profitable, then radio advertising would constitute a separate product market notwithstanding some loss of advertisers to other forms of media advertising.<sup>53</sup> Thus, merely showing, as Dr. Stockum does, that advertisers differ in the quantity of radio advertising they purchase currently and over time is by itself insufficient to rebut our presumption that radio advertising is the relevant product market.

22. *Relevant Geographic Market.* Nassau also seeks to rebut the presumption in our interim policy that the relevant geographic market for competition analysis is the relevant Arbitron metro market. Nassau asserts that the Trenton Arbitron metro does not reflect the actual geographic area in which radio stations in the Trenton metro compete for advertisers.<sup>54</sup> Nassau asserts that the relevant market in this case is coextensive with the market formed by the contour overlap market definition in our local radio ownership rule, which more accurately reflects audience reach.<sup>55</sup> Alternatively, Nassau asserts that the relevant geographic market should be defined as the Arbitron Total Service Area (“TSA”), which includes Mercer, Somerset, Hunterdon, Bucks, and Burlington counties.<sup>56</sup> Nassau asserts that radio stations in the Trenton metro generate both substantial listenership and advertising revenue throughout the TSA.<sup>57</sup> Dr. Stockum argues for a larger geographic market definition which would include Philadelphia and New York City.<sup>58</sup> He asserts that New York and Philadelphia stations engage in format competition with Trenton stations and that a number of Trenton businesses advertise on New York and Philadelphia stations.<sup>59</sup>

23. The issue of relevant geographic market is particularly difficult in this case. To determine relevant geographic market, standard antitrust analysis evaluates whether a hypothetical monopolist in a particular geographic area could profitably raise prices by a “small but significant and nontransitory” amount.<sup>60</sup> In markets such as radio advertising, where individually negotiated contracts facilitate price

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<sup>51</sup> Stockum Affidavit at 3-4.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> Because radio advertising rates are negotiated individually, a station group can price discriminate such that only advertisers with fewer media options pay a higher price. As a result, radio stations can minimize the loss of advertisers and diversion of advertising volume by selectively increasing the price of advertising only to advertisers known to be somewhat price insensitive, *i.e.*, tend to have an inelastic demand for radio advertising, relative to advertisers that are more price sensitive.

<sup>54</sup> Nassau Dec. 6, 2001 Response at 21-22.

<sup>55</sup> *Id.* at 22. Nassau asserts that over 70 percent of Trenton metro listeners listen to radio stations that are not “home” to the Trenton metro. *Id.* at 23.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Stockum Affidavit at 4-6.

<sup>59</sup> *Id.* at 5-6.

<sup>60</sup> See 1997 Merger Guidelines § 1.2.

discrimination, determining the relevant geographic market is more complicated.<sup>61</sup> Here, assuming a single firm monopolized the radio advertising market in the Trenton metro and raised its prices, the evidence suggests that certain types of advertisers, predominantly regional and national advertisers, may find certain out-of-market radio stations, particularly certain Philadelphia stations, sufficient alternatives.<sup>62</sup> With a large majority of the Trenton audience listening to out-of-market stations, regional or national radio advertisers are unlikely to be so dependent on Trenton radio stations to reach their targeted audience as to make an attempt to charge them supracompetitive prices profitable. On the other hand, local Trenton advertisers, *i.e.*, those seeking to focus their advertising on potential customers located in the Trenton metro, would likely not find most Philadelphia and New York stations acceptable alternatives because these advertisers would have to pay significantly higher rates in these larger markets without reaching a significantly larger share of the target audience. Because the issue of the relevant geographic market is complex in this case, and because we find that the proposed transaction is consistent with the public interest even under the narrowest of the market definitions, we assume without deciding that the relevant geographic market is the Trenton Arbitron metro market.

24. *Market Participants.* In addition to the Nassau and Great Scott stations, the following commercial band radio stations are reported by BIA as having their home market in the Trenton metro: (1) WBUD(AM), Trenton, New Jersey, owned by Press; (2) WIMG(AM), Trenton, New Jersey, owned by Morris Broadcasting Company; (3) WRRC(FM), Lawrenceville, New Jersey, owned by the Board of Trustees of Rider College; (4) WPRB(FM), owned by Princeton Broadcasting Service, Inc.; and (5) WWPH(FM), Princeton Junction, New Jersey, owned by West Windsor Plainsboro Regional School. In addition, if Nassau's proposed sale to MBI is consummated,<sup>63</sup> MBI will be a new participant in the Trenton market with its ownership of WTTM(AM) and WHWH(AM).<sup>64</sup> Although all of these stations are licensed as commercial radio stations, we note that three of these stations are licensed to educational institutions.

25. Nassau argues that Press's WKXW(FM), Trenton, New Jersey, should also be considered a market participant.<sup>65</sup> Although WKXW(FM) was located in the Trenton metro market when these applications were filed, it was moved by Arbitron to the Middlesex-Somerset-Union, New Jersey market during their pendency. We agree with Nassau that WKXW-FM should be considered a market participant in the Trenton market for purposes of our competition analysis. It is licensed to Trenton and places a city grade signal over Trenton.<sup>66</sup> It also receives the second highest listening share in Trenton. Given these facts, we believe that radio advertisers would consider WKXW-FM a participant in the Trenton market despite Arbitron's designation of the Middlesex-Somerset-Union market as the station's home market.

26. Nassau admits that many out-of-market radio stations with a reportable listening share in

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<sup>61</sup> *See id.* § 1.22.

<sup>62</sup> We note that the Trenton metro is located near to the Philadelphia and New York metros, two of the largest metros in the country, and that the city of Trenton is situated near the border of the Trenton metro and the Philadelphia metro (more specifically, near the border of Mercer County and Bucks County).

<sup>63</sup> *See note 13 supra.*

<sup>64</sup> After the transaction, Nassau will continue to operate WHWH(AM) pursuant to a TBA. *See Nassau Dec. 6, 2001 Response at 25 n.59.*

<sup>65</sup> Nassau Dec. 6, 2001 Response at 19-21, 23.

<sup>66</sup> 47 C.F.R. § 73.315.

Trenton would not attract Trenton advertisers.<sup>67</sup> Nassau argues, nevertheless, that ten out-of-market stations generate an estimated \$4,675,000 in revenue from Trenton advertisers and should, therefore, be counted as market participants.<sup>68</sup> We will consider Nassau's argument concerning these stations in our discussion below of market share and market concentration.

27. *Market Share and Market Concentration.* According to the BIA database, radio stations that are home to the Trenton metro market generate \$14,800,000 in radio advertising revenues. If the reported station revenues of WKXW-FM, whose home market is the Middlesex-Somerset-Union market, is attributed to the Trenton market, the radio advertising market in Trenton increases by \$7,600,000 for a total market size of \$22,400,000. Using BIA database data, the pre-merger market structure in the Trenton metro is as follows:<sup>69</sup>

	Market Revenue	Market Share
Nassau		
WPST(FM)	\$7,500,000	33.4%
MBI		
WHWH(AM)	\$350,000	1.6%
WTTM(AM)	\$150,000	0.7%
Great Scott	\$4,750,000	21.2%
Press <sup>70</sup>	\$8,600,000	38.4%
Princeton Broadcasting	\$200,000	0.9%
Morris Broadcasting	\$850,000	3.8%
Total market revenue	\$22,400,000	100%

Thus, using BIA database data, the proposed transaction would increase Nassau's market share in the Trenton Arbitron from 35.7 percent to 56.9 percent.<sup>71</sup> Under the Herfindahl-Hirshman Index ("HHI"), this represents an increase in HHI of 1514, and a post-merger HHI of 5223.

28. Nassau contests the BIA database figures in several respects. First, Nassau argues that the total station revenue for the five stations it would own post-merger (including the two being sold to MBI) is actually \$12,607,159, or approximately \$140,000 less than the BIA reported figures.<sup>72</sup> Second, Nassau argues that the Press stations have a total revenue of \$16,000,000.<sup>73</sup> Third, Nassau argues that, based on

<sup>67</sup> *Id.* at 24; 2001 BIA Special Study at 9-10.

<sup>68</sup> Nassau Dec. 6, 2001 Response at 24; 2001 BIA Special Study at 9-10. According to Nassau, these stations are: WDAS-FM, WUSL(FM), WJJZ(FM), and WIOQ(FM), Philadelphia, owned by Clear Channel Communications; WOGL-FM and WYSP(FM), Philadelphia, owned by Infinity Broadcasting; WXTU(FM) and WPTP(FM), Philadelphia, owned by Beasley Broadcast Group; and WMGK(FM) and WMMR(FM), Philadelphia, owned by Greater Media.

<sup>69</sup> Radio stations with no reported revenue are not included in the chart.

<sup>70</sup> Includes the revenues of WKXW(FM).

<sup>71</sup> If WTTM(AM) is sold to MBI, Nassau's pre- and post-merger market shares would be 35 percent and 56.2 percent, respectively. Although WHWH(AM) may also be sold to MBI, Nassau will broker that station after the sale. Because attributing the revenues of WHWH(AM) to Nassau would not alter the result in this case, we need not decide here how to treat Nassau's brokerage of WHWH(AM) in our competition analysis.

<sup>72</sup> Nassau Dec. 6, 2001 Response at 26.

<sup>73</sup> *Id.* Nassau agrees with BIA that WBUD(AM) has revenues of \$1,000,000, but argues that WKXW-FM has revenues of \$15,000,000 instead of \$7,600,000, as reported by BIA.

the record in this proceeding, only 19.7 percent of its stations' revenues and 15 percent of the revenues of WKXW(FM) are from Trenton advertisers. Therefore, according to Nassau, the revenues figures for these stations should be proportionately discounted and the total Trenton market revenue figures should be reduced to \$11,458,610.<sup>74</sup> Finally, Nassau argues, based on estimates in the 2001 BIA Special Study, that the asserted \$4,675,000 in revenues that ten out-of-market stations earn from Trenton advertisers should be counted in determining market share and market concentration.<sup>75</sup> With these adjustments, Nassau argues that its post-merger market share would be 21.7 percent, and that the post-merger HHI would be 2,230 with a change in HHI of 471.<sup>76</sup>

29. We decline Nassau's suggestion to attribute to Press a total revenue figure of \$16,000,000. Nassau provides no support for its asserted revenue figure, which is almost double the \$8.6 million revenue figure that the BIA database attributes to Press's two stations.<sup>77</sup> Leaving aside Nassau's request to include certain out-of-market stations in the Trenton radio advertising market, Nassau's other suggested adjustments would reduce its post-merger market share from 56.9 percent to 51.5 percent.<sup>78</sup>

30. Nassau's assertion that ten out-of-market stations generate an estimated \$4,675,000 in revenue from Trenton advertisers is more significant because, if we consider those revenues, Nassau's post-merger market share decreases to approximately 26 percent (assuming we adopt Nassau's other proposed adjustments except for its suggested modifications to Press's revenues). Both the list of out-of-market stations that compete for Trenton advertisers and their estimated revenues from Trenton advertisers ultimately derive from Nassau, and "the experience of the relevant employees with the condition of the market in which Nassau stations currently operate and their expertise in the field of broadcast station management."<sup>79</sup> In addition, Nassau has provided evidence that specific businesses in Trenton have advertised on out-of-market stations in Philadelphia and New York.<sup>80</sup> Press, on the other hand, argued that out-of-market stations do not compete for advertisers located in the Trenton metro and that out-of-market stations charge Philadelphia or New York-level rates that would not be sensible for those advertisers to pay.<sup>81</sup> In addition, Press asserts that a review of select Philadelphia stations revealed

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 26; 2001 BIA Special Study at 10.

<sup>76</sup> Nassau Dec. 6, 2001 Response at 26-27; 2001 BIA Special Study at 12-13.

<sup>77</sup> Nassau cites the 2001 BIA Special Study of the Trenton market for its proposed figures. *See* 2001 BIA Special Study at 11. The 2001 BIA Special Study does not indicate how Press's revenue figure was calculated or why that figure is substantially higher than the reported figure in the BIA database. This omission is particularly significant here because (1) the other stations' revenue figures in the 2001 BIA Special Study are roughly consistent with the figures in the BIA database and (2) BIA indicates that it obtained much of its factual information from Nassau. *Id.* at 3 n.2.

<sup>78</sup> This post-merger market share was derived by (1) accepting Nassau's asserted post-merger revenue figure of \$12,607,159, (2) counting only 19.4 percent and 15 percent of the station revenues of Nassau's proposed station group and WKXW(FM), respectively, toward their Trenton market shares, and (3) adjusting the total market revenue figure in accordance with the preceding adjustments.

<sup>79</sup> Nassau Dec. 6, 2001 Response, Declaration of Louis F. Mercatanti, Jr., at ¶ 3.; *see also* 2001 BIA Special Study at 3 n.2 (2001 BIA Special Study based on information provided by Nassau officers); *id.* at 9 (out-of-market station list and revenue estimates were generated by Nassau). *But cf.* Nassau Nov. 18, 1998 Supp., Att. 1 at 15-16 (suggesting that BIA independently concluded that out-of-market stations sell advertising in the Trenton metro market).

<sup>80</sup> Nassau July 8, 1999 Response at Tab 6.

<sup>81</sup> Press Comments at 4-5; Press Dec. 4, 1998 Response at 8 & n.8.

no advertisements by advertisers located in the Trenton metro, and submitted evidence that at least some Philadelphia stations do not solicit nor are solicited by advertisers in the Trenton metro.<sup>82</sup>

31. Although Press has stated that it is withdrawing its comments in this proceeding, we cannot ignore the arguments and evidence that Press has submitted regarding the competitive impact of out-of-market stations in Trenton. Our review of the record indicates that the advertising rates charged by stations in the Philadelphia metro exceed, on average, the rates charged by stations in the Trenton metro and that this rate differential limits the degree to which advertisers would substitute stations in the Philadelphia metro for stations in the Trenton metro. We find, however, that this barrier to substitutability is not absolute and that some advertisers would find out-of-market radio stations acceptable substitutes for in-market stations. After considering the evidence submitted in the record, we conclude that we should give limited weight to the potential competitive influence of out-of-market stations in our public interest analysis, although, as indicated below, we find that precisely quantifying the degree of influence is not necessary for us to decide this case.

32. *Potential for harm to advertisers and listeners.* We find that proposed post-merger concentration levels raises potential competitive concerns. The proposed transaction essentially would reduce from three to two the number of commercial FM station owners in the Trenton market that are operated by entities other than educational institutions. The proposed transaction also would combine two of the three highest revenue generating stations in the Trenton metro market to create a new station group that could have a market share of up to 57 percent. The proposed transaction also produces a significant increase in market concentration, producing a post-merger HHI of 5223 with an increase in HHI of 1514. We believe that this concentration level raises “significant competitive concerns.”<sup>83</sup>

33. Under our interim policy, we consider this post-merger concentration level in connection with the specific circumstances of this case to determine the potential impact of the proposed transaction on the public. As we have previously stated, HHI calculations “must be carefully interpreted with the context of the factual circumstances of any individual case,” and requires consideration of, among other things, any “possible adverse effects on listeners in the local radio market.”<sup>84</sup> In this case, we find that several factors mitigate any adverse impact that otherwise could result from the concentration levels produced by the proposed transaction and thus diminish our public interest concerns.

34. Initially, we note that Nassau seeks to alleviate the competitive concerns raised by the proposed transaction by arguing that ten Philadelphia stations compete in the Trenton metro and thus reduce Nassau’s post-merger market share and concentration levels. Specifically, Nassau’s post-merger market share would be reduced to 26 percent, and the post-merger HHI would be 2,230 with a change in HHI of 471, if we fully accepted Nassau’s argument.<sup>85</sup> As indicated above, we cannot fully agree with Nassau’s proposed finding based on the record we have before us. We do, however, acknowledge that Nassau’s post-merger market share and concentration level may be overstated to the extent that any of these Philadelphia stations actually compete in the Trenton market.

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<sup>82</sup> Press Apr. 16, 1999 Response at 7-9.

<sup>83</sup> See *1997 Merger Guidelines* § 1.51(c).

<sup>84</sup> See *Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145, 11151 ¶ 16 (1999).

<sup>85</sup> Nassau Dec. 6, 2001 Response at 26-27; 2001 BIA Special Study at 12-13. These HHI figures assume that we adopt all of Nassau’s proposed adjustments to the BIA data, *see supra* ¶ 28, but that we do not adopt Nassau’s arguments in favor of a larger product or geographic market definition.

35. We also find that the low in-market listening share in the Trenton metro helps mitigate any potential harm to advertisers and listeners that could result from the proposed transaction. The record indicates that stations in the Trenton metro and WKXW(FM) capture only 36.7 percent of the Trenton audience, with the remaining 63.3 percent of listeners choosing to listen to out-of-market stations other than WKXW(FM).<sup>86</sup> In the 2001 BIA Special Study, BIA indicates that 30 out-of-market radio stations (not including WKXW(FM)) have enough Trenton listeners to meet minimum reporting standards.<sup>87</sup> The BIA database further indicates that some of these out-of-market stations have listening shares and formats that are comparable to those of most Trenton stations. Moreover, aside from WKXW(FM), none of these out-of-market stations are owned by Nassau or Press. For national and regional advertisers in particular, the degree to which out-of-market stations attract Trenton listeners indicates that those advertisers can reach Trenton listeners without purchasing advertising from radio stations in the Trenton metro. As a result, we find that these advertisers are unlikely to be adversely affected by the proposed transaction.

36. Local advertisers, *i.e.*, advertisers seeking to focus their advertising on potential customers in the Trenton metro area, are less likely to have the same competitive alternatives as national and regional advertisers. These advertisers may not find it cost effective to pay generally higher out-of-market advertising rates to reach a target audience that is located in the Trenton metro, and thus these advertisers may be subject to supracompetitive rates to the extent that the dominant players in the market can effectively price discriminate against these advertisers. Absent additional considerations, the potential that these advertisers may be harmed implicates our public interest concerns because we believe that the economic incentives inherent in a fully functioning competitive market are the most effective way to maximize listener benefits. We find, however, that certain additional considerations are present in this case that overcome our concern about any potential competitive harm to local advertisers.

37. We already have discussed one such consideration: the relatively high portion of Trenton listeners that listen to out-of-market stations. The BIA database indicates that Trenton is the home market of 13 radio stations and the city of license of WKXW(FM). In contrast, the BIA database lists 42 out-of-market stations (not including WKXW(FM)) as having a discernible listening share in the Trenton market, and, of these, 30 stations have a reportable listening share.<sup>88</sup> Trenton listeners appear willing to take advantage of these listening choices. While Trenton stations (including WKXW(FM)) in the aggregate captured 36.7 percent of the Trenton audience, the aggregate listening shares for out-of-market stations was 63.3 percent.<sup>89</sup> Nor is out-of-market listenership so fractionalized as to diminish its influence; to the contrary, the third, fourth, and fifth largest stations in Trenton in terms of listening share are out-of-market stations.<sup>90</sup> We also consider particularly significant that the vast majority of these out-of-market stations are commercial stations, which are more likely to provide direct format and demographic competition to the commercial stations in Trenton than non-commercial stations would.<sup>91</sup> We find that the large number and relative success of out-of-market stations among Trenton listeners is a significant consideration in this case because their presence reduces, if not eliminates, the number of radio listeners in Trenton that are “captive” to Trenton stations. We believe the ease with which Trenton listeners can switch to other commercial radio stations helps constrain the incentive and ability of

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<sup>86</sup> 2001 BIA Special Study at 7.

<sup>87</sup> *Id.* at 6.

<sup>88</sup> *See id.*

<sup>89</sup> *Id.*

<sup>90</sup> WJJZ(FM), Philadelphia, and WNJO(FM), Trenton tie for the fifth spot.

<sup>91</sup> *See* Stockum Affidavit at ¶¶ 38-39.

dominant station groups in Trenton to diminish program quality or quantity and thereby harm listeners.<sup>92</sup>

38. Another consideration is the relatively high percentage of revenues that the two largest station groups, Nassau and Press, derive from advertisers other than local advertisers. The record indicates that Nassau obtains approximately 80 percent of its revenues from non-local advertisers, and the record indicates that WKXW(FM) derives an equivalent or higher percentage of its revenues from non-local advertisers.<sup>93</sup> Because these advertisers generally will have more competitive alternatives to reach Trenton audiences (*i.e.*, the out-of-market stations previously discussed), they can choose not to advertise on radio stations in the Trenton metro if those stations lose significant audience share to out-of-market stations as a result of reduced program quality or quantity. Accordingly, we believe that competition for these advertisers, and the relatively high percentage of revenues they generate, will provide an additional incentive for Nassau and Press to ensure that program quality and quantity do not deteriorate.

39. We also find it unlikely that the proposed transaction could create a market structure that would harm independent radio stations in the Trenton metro to the point where they could not effectively serve the public or remain on the air. Press has a significant market presence in Trenton and thus is unlikely to suffer competitive harm. Most of the other commercial radio stations in the Trenton metro are owned by educational institution, and are thus also unlikely to suffer competitive harm. The only remaining commercial station that could be affected, therefore, is WIMG(AM), a station that has been in service since 1923. For the proposed transaction to harm WIMG(AM), it would have to facilitate the ability of Nassau, Press, or both, to take actions that would reduce the willingness of advertisers to advertise on WIMG(AM) at rates that would maintain its competitive viability.<sup>94</sup> We find no evidence in the record that any such actions have occurred, even though Nassau has been operating the Great Scott stations pursuant to a local marketing agreement (“LMA”) since May 1997.<sup>95</sup> Moreover, MBI’s decision to purchase Nassau’s existing AM stations indicates that independent third parties find that they can operate a successful radio business in the Trenton metro despite the market structure. On this record, we find the potential of harm to WIMG(AM) too uncertain and unlikely to constitute a significant consideration.

40. Finally, we note that we give little weight to Nassau’s argument concerning new entry into the market.<sup>96</sup> The three commercial band FM stations in Trenton that would not be owned by Nassau or Millennium are all owned by educational institutions. Although it is possible that a new entrant could seek to buy one or more of these stations in response to the exercise of market power, we find the possibility that one or more of these educational institutions would sell their stations to a new entrant too speculative on this record to give it significant weight in our analysis.

41. In sum, although the proposed transaction produces concentration levels that raise competitive concerns, we find that the specific competitive characteristics of the Trenton metro market mitigates our concerns and that the proposed transaction is unlikely to produce any harm to the listeners

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<sup>92</sup> We also note Nassau’s assertion that over 60 percent of its listeners reside outside of the Trenton metro. Nassau Dec. 6, 2001 Response at 23. To the extent that Nassau faces even greater competition for listeners in those outer areas, Nassau’s incentive to not adversely affect program quality or quantity is further enhanced.

<sup>93</sup> Nassau Dec. 6, 2001 Response at 23.

<sup>94</sup> To the extent that WIMG(AM)’s revenues are generated from non-local advertisers, that would reduce the potential that WIMG(AM) would suffer competitive harm.

<sup>95</sup> Nassau Dec. 6, 2001 Response at 27.

<sup>96</sup> *Id.* at 29.

in the Trenton metro.

42. *Efficiencies and other public interest benefits.* Nassau argues that the proposed transaction will produce efficiencies and public interest benefits for listeners in the Trenton market, as demonstrated by its operation of the Great Scott stations pursuant to an LMA.<sup>97</sup> After reviewing the record, we agree that the proposed combination will provide certain public interest benefits that, in light of our finding that the proposed transaction will not result in public interest harms, warrants grant of the underlying applications.

43. We find that Nassau's operation of WNJO(FM) has considerably improved that station's performance.<sup>98</sup> As Press admitted in its earlier filings, Nassau's operation of WNJO(FM), in particular its decision to change the format of the station, has resulted in a substantial increase in the station's listenership from 0.5 percent audience share in 1997 to a current audience share of 4.4 percent.<sup>99</sup> Indeed, a substantial part of the market concentration concern that surrounds the proposed transaction is the result of Nassau's successful operation of the WNJO(FM). Although we disagree with Nassau that this fact compels us to grant its applications,<sup>100</sup> we believe that it is appropriate for us consider its proven success in evaluating public interest benefits.

44. The record also indicates that the combined operation of the Nassau and Great Scott stations has improved local access to news, weather, and local information.<sup>101</sup> Currently, all of the stations in the proposed combination offer these services to the local community.<sup>102</sup> We find that this also is a public interest benefit that weighs in favor of grant.<sup>103</sup>

#### IV. CONCLUSION

45. Based on the foregoing analysis, we find no substantial and material questions of fact as to the effect of the proposed transaction on competition that would warrant further inquiry. In addition, we have reviewed the assignment applications and find that the Nassau is qualified and that grant of the transaction is consistent with the public interest, convenience and necessity.

#### V. ORDERING CLAUSES

46. ACCORDINGLY, IT IS ORDERED, That the application to assign station WCHR(AM), Trenton, NJ, from Great Scott Broadcasting to Nassau Broadcasting II, L.L.C. (File No. BAL-980910GI) IS GRANTED.

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<sup>97</sup> *Id.* at 30.

<sup>98</sup> *Id.*

<sup>99</sup> Press Dec. 4, 1998 Response at 3; *see also* Nassau Dec. 6, 2001 Response at 27-28; 2001 BIA Special Study at 17. At one point during this period, WNJO(FM)'s audience share reached 7.7 percent. *Id.* at 16.

<sup>100</sup> *See* Nassau Dec. 6, 2001 Response at 17-18.

<sup>101</sup> 2001 BIA Special Study at 17.

<sup>102</sup> *Id.* Nassau also asserts that common operation enabled it to put WTTM(AM) on the air with a new sports format, has resulted in operational efficiencies, and has enabled Nassau to devote 25 percent of the stations' inventory to public service announcements. *Id.* at 16-17. Because Nassau either fails to describe these benefits with enough specificity or fails to demonstrate why these benefits are merger-specific, we reject them.

<sup>103</sup> Because we grant these applications, we do not need to reach Nassau's statutory and fairness challenges to our interim policy.

47. IT IS FURTHER ORDERED, That the application to assign station WNJO(FM), Trenton, NJ, from Great Scott Broadcasting to Nassau Broadcasting II, L.L.C. (File No. BALH-980910GJ) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

**SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL**

*Re: Application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;*

*Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;*

*Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;*

*Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and*

*Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.*

Today, we act on five of the oldest and most difficult radio assignment cases pending before us. Guided by the Communications Act, Commission precedent, and the Interim Policy we adopted in the Local Radio Ownership NPRM, we find in four of these cases that the license assignments are consistent with the public interest, and therefore we grant the applications. Relying on this guidance in our review of the license assignment in Charlottesville, Virginia, however, we cannot find based on the record before us that the license assignment is consistent with the public interest. Therefore, as required by the Communications Act, we designate that application for hearing.

Each of the five cases we decide today present difficult policy issues that arise from the increasing levels of concentration that have occurred in the radio market since 1996, when Congress significantly relaxed the limits on ownership of radio stations in a local market. A genuine concern about increased levels of concentration led the Commission to start “flagging” certain cases. Despite the Commission’s attempts, this ad hoc process too often led to inconsistent decision-making and delays in processing applications. To remedy this problem,

and “to undertake a comprehensive examination of our rules and policies concerning local radio ownership,” we adopted the *Local Radio Ownership NPRM*.<sup>1</sup> This proceeding will address difficult questions which to date have remained unresolved.

We recognized, however, that a final decision in the Local Radio Ownership proceeding would take time, and that too many radio assignment cases have been pending for too long. Accordingly, we established an Interim Policy, to provide greater transparency to the review process and to “guide our actions on radio assignment and transfer of control applications pending a decision in this proceeding.”<sup>2</sup> Under this policy, in addition to examining whether the proposed assignment complies with the Communications Act and the Commission’s rules, we conduct a competitive analysis of the proposed transaction and examine the potential impact of concentration in advertising markets. Our public interest analysis does not stop there, however. Unlike antitrust agencies, which focus solely on whether the effect of a proposed merger “may be substantially to lessen competition,”<sup>3</sup> the Commission must examine other factors. Indeed, the Communications Act compels us to consider the broad aims of “ensuring the existence of an efficient, nationwide radio communications service”<sup>4</sup> and promoting locally oriented service and diversity in media voices.

In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners. Thus, while our competitive analysis is informed by antitrust principles, our ultimate obligation is to consider the potential benefits and harms of the transaction on the listening public. Where we find evidence that a proposed transaction will benefit listeners, we must weigh that factor against the potential harm to advertisers in determining whether the transaction is consistent with the public interest. We must also examine whether particular or unique circumstances of a market might mitigate the potential harm from such high levels of concentration. But where we cannot find an overall benefit to listeners or mitigating factors, we have no basis on which to conclude that the transaction will serve the public interest. In those cases, we must designate the application for hearing.

As stated, in four of the cases before us, the Commission found that, on balance and for different reasons, grant of the applications served the public interest. In Trenton, for example, we found that the “in market” stations capture only 36.7% of the Trenton audience, while the remaining 63.3% listen to “out of market stations.” Moreover, thirty “out of market stations” have enough Trenton listeners to meet BIA reporting data. We also found that, through its operation of WNJO (under an LMA agreement), the applicant has considerably improved the station’s performance through improved local news, weather and information.

In Cheyenne the record showed that the relevant geographic market is not the Cheyenne Arbitron metro because among other things, one of the tallest mountains in the area significantly limits the reach of the radio station signals of the assignor and assignee into each other’s service

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<sup>1</sup> See, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001).

<sup>2</sup> *Id.* at 19894 (¶ 84).

<sup>3</sup> 15 U.S.C. § 18.

<sup>4</sup> 47 U.S.C. § 151.

areas. Thus, we concluded that the stations do not today, nor will they in the future, compete for advertising. In Columbus, Georgia, we found that significant format and radio advertising competition from three large radio station groups, one new entrant, and one out-of market radio station would continue to exist after the transaction. Finally, in Columbus-Starkville, Mississippi, we found that the potential for competitive harm was outweighed by the significant public interest benefits to listeners, including greater access to locally generated radio programming.

In Charlottesville, however, no public interest benefits or mitigating circumstances were presented that would outweigh the high level of concentration that the proposed transaction would produce. Indeed, on the record before us, the only significant evidence presented was that the transaction would create a market in which the top two owners would have a combined 94.2% market share. This level of concentration, in the absence of any countervailing considerations or public interest benefits, is simply too significant for us to conclude that, on balance, the transaction is consistent with the public interest. Accordingly, in this case, we designate, as we must, the assignment application for hearing to determine whether grant would serve the public interest, convenience and necessity.

**SEPARATE STATEMENT OF COMMISSIONER KATHLEEN ABERNATHY**

*Re: Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;*

*Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;*

*Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;*

*Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and*

*Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.*

I support today's decisions granting four of the five oldest pending radio merger applications and setting one for hearing. I recognize that these cases have raised particularly difficult issues, but that is not a reason for failing to resolve them in a timely manner. I am pleased that, by today's decisions, we are finally able to provide answers to the applicants – some of whom have been waiting for years. Regardless of the outcome, the Commission owes it to consumers and the industry to provide prompt and clear answers to regulatory questions. I look forward to working with my colleagues to resolve the other pending radio applications and the outstanding Notice of Proposed Rulemaking.

**STATEMENT OF COMMISSIONER MICHAEL J. COPPS  
ON RADIO TRANSFER APPLICATIONS**

*In the Matter of Golden Triangle Radio, Inc., Charisma Broadcasting Co.,  
Bravo Communications, Inc., Radio Columbus and Cumulus Licensing Corp.  
(Columbus, MS)*

*In the Matter of Solar Broadcasting Company,  
Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses Inc.  
(Columbus, GA)*

*In the Matter of Great Scott Broadcasting and Nassau Broadcasting  
(Trenton, NJ)*

*In the Matter of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc.  
(Charlottesville, VA)*

*In the Matter of Gowdy FM 95 and Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc.  
(Laramie, WY)*

I have struggled to find the public interest in the grant of these transfers. Given the levels of market concentration – both of advertising and audience share – that will result from these transactions, I can support the grant of only one of the five transfers at issue here. That one transaction arises in a unique geographic circumstance, in which the potential harm to competition was not significant and was outweighed by the benefits of the transaction. In the other four cases, however, I find evidence of significant anticompetitive effects. I could not support grant of these transfers absent additional information on the public interest benefits. I support the decision of the Commission to send one of these five transfers to hearing, and would have sent another three to hearing as well.

I am troubled by the trend toward greater and greater consolidation of the media as exemplified by these transactions. I am further troubled by the Commission's acceptance of these levels of concentration in radio, particularly in the smaller radio markets at issue here. The five transactions before us here would each result in levels of concentration that are greater than that approved by the Commission in the past, and are potentially harmful to competition. Given the small markets at issue here, the effects of extreme concentration are that much more pernicious.

Each transaction presents slightly different issues regarding the acceptable levels of concentration in a market, the definition of a local radio market, or the attribution of local marketing agreements for the purposes of competitive analysis. The one transaction I am able to support, albeit hesitantly, involves the transfer of the Gowdy stations in Laramie, Wyoming to Clear Channel Broadcasting, Inc. While I am tremendously concerned about the unprecedented levels of market domination Clear Channel has achieved in radio markets throughout the country – including in Cheyenne, Wyoming – the transaction before the Commission does not appear to

increase Clear Channel's dominance in this market. Due to the unique topography of the area, the Laramie stations deliver marginal signals into Cheyenne. This geographic anomaly permits the substitution of separate geographic markets for Cheyenne and Laramie, in lieu of the presumptive Arbitron market definition, thus I support the transfer of these licenses from the Gowdy licensees to Clear Channel.

Speaking generally, however, these transactions, taken together with the dozens of transactions approved by the Bureau last year, result in the Commission's adoption of an unacceptable standard for concentration in local radio markets. The amount of concentration in the markets at issue here is potentially very harmful to competition, to the listening public and to America's deeply held values of localism and diversity.

As I have often stated, Congress directed us to look to the public interest as we review transactions. Congress told the Commission that it may grant a broadcast license transfer only if "the public interest, convenience and necessity will be served thereby."<sup>1</sup> Competition is, and always has been, an essential part of the public interest, and I believe that a competitive analysis is an important part of the public interest in a particular transaction.<sup>2</sup>

I don't think that my faith in competition is particularly radical. In fact, it is a cardinal principle underlying the 1996 Act. In these relatively small radio markets, the anticompetitive effects of such high levels of concentration are likely to be especially pronounced. When one or two owners wield this much power in a particular market, they can make it impossible for independent stations to survive or even compete.

When it comes to transfers of broadcast licenses, our analysis must go beyond competitive analysis, to the effects of the transfer on factors unique to broadcasting – localism and diversity. This is consistent with Commission precedent, in which we have found that we have "an independent obligation to consider whether...radio ownership that complies with the local ownership limits would otherwise have an adverse competitive effect in a particular radio market and thus, would be inconsistent with the public interest."<sup>3</sup>

Neither is this a radical position. As a market-based democratic society, we value

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<sup>1</sup> 47 U.S.C. § 310(d).

<sup>2</sup> See, e.g., *FCC v RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) ("There can be no doubt that competition is a relevant factor in weighing the public interest."); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950) ("Monopoly in the mass communications of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws."); *Rogers Radio Communications Services, Inc. v. FCC*, 593 F.2d 1225, 1230 (D.C. Cir. 1978) (The "effect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard. . .").

<sup>3</sup> *CHET-5 Broadcasting L.P.*, 14 FCC Rcd 13041, 13043 (1999).

independent voices in the media. For a robust marketplace of ideas to survive, *each community* must have a diversity of sources of information available to its members – not just a *variety* of formats, but *diversity* of formats and of ownership. As consolidation of market power makes it harder and harder for independent stations to compete, local markets lose the diversity so essential to the free exchange of ideas in their community.

No single factor necessarily defines whether a particular transaction is in the public interest. Nevertheless, when harm to competition is likely to result from the grant of an application, it behooves the Commission to assure itself with as much certainty as is possible, that despite the harm to competition, each transaction will nonetheless serve the public interest, convenience and necessity. In order to make this determination where such high concentration levels will result, without clear evidence of strong public interest benefits, as in four of the cases before us today and discussed below, I am convinced that we must further examine the issues at a hearing.

**SEPARATE STATEMENT  
OF COMMISSIONER KEVIN J. MARTIN**

*Re: Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;*

*Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;*

*Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;*

*Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and*

*Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.*

I – as well as everyone at the Commission – am concerned about the increasing levels of concentration of radio station ownership that has taken place during the last five years.

Last November, the Commission issued a NPRM undertaking a comprehensive review of how the Commission should assess radio license transfer applications. At that time, I expressed my dismay at the length of time many of these applications had been pending at the Commission. I am heartened that today, we are ruling on the five oldest applications (all pending for over 16 months).

All of the pending transfer applications comply with the structural ownership limits created by Congress in §202(b) of the 1996 Telecommunications Act. I continue to believe such structural limits should make our review of proposed mergers easier, not more complicated. I thus expressed my reluctance last November in agreeing to an interim policy that continued – and expanded upon – the practice of flagging particular transfers for a more detailed analysis, when they would be below the statutory ownership limit. Nevertheless, I voted for the NPRM because it fairly raised the issue of what our policy should be with respect to assessing radio transfers, and it included timing deadlines that would ensure timely action on the pending applications. Today's actions on the oldest applications are a direct result of those deadlines. I am extremely pleased that we finally are providing the parties with resolution.

Each of the applications listed above was subjected to a comprehensive competitive analysis as set forth in the interim guidelines. I agree with the majority of my colleagues that the factors weigh against granting Clear Channel's acquisition of Air Virginia's radio license in Charlottesville, VA. Based on the record before us, I am unable to conclude that this transfer would serve the public interest. I therefore vote to set this application for hearing.